Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1052~~ 157

COMPANIA ITHACA DE VAPORES, S. A.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Of Counsel

IN THE

Supreme Court of the United States

October Term, 1956

COMPANIA ITHACA DE VAPORES, S. A., *Petitioner,* *v.* THE UNITED STATES OF AMERICA, *Respondent.*	No.

Petition for a Writ of Certiorari to the United States Court of Claims

Petitioner herein, Compania Ithaca de Vapores, S. A., respectfully prays that a Writ of Certiorari be issued to review a decision of the United States Court of Claims on March 6, 1957 denying plaintiff recovery on a settlement agreement compromising its claim for bauxite damage to its ship while under time charter to defendant, the United States of America.

Opinion of the Court Below

The opinion of the Court of Claims is printed in the appendix hereto and is reported at 149 F. Supp. 257. The opinion of the Court of Claims denying respondent's motion for summary judgment is reported at 124 F. Supp. 627.

Jurisdiction

The decision of the United States Court of Claims was rendered for March 6, 1957.

The cause has been brought by a petition filed by the plaintiff herein against the respondent seeking recovery under a contract based on a compromise settlement agreement.

The jurisdiction of this Court to review by Writ of Certiorari the decision complained of is conferred by 28 U. S. C. Sec. 1255.

Question Presented

Whether an administrative agency of the United States (the Maritime Commission) may settle a dispute arising out of a maritime contract "subject to clearance by the General Counsel" and, after time has expired for petitioner to seek relief under the Suits in Admiralty Act, the administrative agency on its own initiative may reopen the matter and reverse itself leaving the petitioner without an enforceable remedy.

Statutes Involved

Although the statutory period within which to bring an action in Admiralty against the United States (Suits in Admiralty Act, 46 U. S. C. § 741-752) is mentioned below, it is not directly involved. However, the interpretation of the following administrative order (War Shipping Administrative Order 13, Sup. 18, revised, Amendment 1) is involved.

> "§ 4 Delegation of Authority.
>
> "(a) Authority is hereby delegated to the Director Division of Redelivery of Chartered Vessels, to authorize charterer's repairs, reconversion, removals and restoration, make tenders and settlements, execute agreements subject to clearance by the Legal Division, when the cost of the Government's obligation on any particular vessel does not exceed $10.00 per D. W. T., and to direct redelivery whenever appropriate * * *."

Statement

The petitioner, Compania Ithaca de Vapores, S. A., a Panamanian corporation, had time-chartered its vessel, the MOLDOVA, to the United States of America (War Shipping Administration) under a Warshiptime (Forflag) charter for the greater part of World War II. The survey of the vessel prior to redelivery on February 28, 1946, revealed several hundred items of damage, some attributable to heavy weather, some to collision, and others attributable to the continued use of the vessel in the bauxite (ore) trade. By negotiation the petitioner and respondent settled all of their disputes excepting petitioner's claim for damage caused the vessel while in the bauxite trade, which claim totaled $60,400.91. This failure promptly to settle resulted in protracted negotiations between petitioner's attorney and personnel of the War Shipping Administration and later the Maritime Commission. The duties of the War Shipping Administration were taken over by the United States Maritime Administration and the authority exercised by the Director passed into the hands of the Commission. Finally, in September 1947, plaintiff and the Chief, Bureau of Operations of the Maritime Commission agreed that the petitioner's claim relating to bauxite damage would be reduced to the sum of $38,540.00 and would be settled by a 50% payment. This agreement, reduced to memorandum form, was sent by the Chief, Bureau of Operations to the General Counsel of the Commission where an Assistant General Counsel on September 5, 1947 endorsed it "no legal objection". Finally, on December 8, 1947, the Maritime Commission approved the memorandum of settlement, the minutes of the Commission meeting reading:

> "After discussion, by the unanimous 'yea' vote of the members of the Commission present, the recommendations contained in the foregoing memorandum were approved *subject to clearance by the*

> *General Counsel, and the proper offices of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect.*" (R. p. 20).

On the following day, December 9, 1947, the Secretary of the Commission addressed a memorandum to the General Counsel reading as follows:

> "At a meeting on December 8, 1947, the Commission approved the attached memorandum dated September 15, 1947, from the Chief, Bureau of Operations, subject to clearance by you.
>
> "Kindly furnish me with your clearance as soon as possible." (R. p. 20)

This approval of the Commission was orally communicated to the petitioner's attorney.

Shortly after the Commission's approval on December 8, Commissioner McKeough, who had not been present and who had not voted on the matter, advised the General Counsel that he was asking the Commission to reconsider its action. The matter was placed on the Commission's agenda for January 9, 13, 20, February 4, 24 and March 2, 1948, respectively, and at each meeting was "laid over". Finally, on March 5, 1948, the Commission again acted, reversing its former action, and disapproved the settlement.

On February 28, 1948 the petitioner's time to commence an action, based upon the charterparty dispute, against the respondent in admiralty under the Suits in Admiralty Act had expired. Although such an action was later commenced, it was properly dismissed by the United States District Court for the Southern District of New York as having been untimely brought.

Based on the foregoing, the petitioner commenced its action against the respondent in the United States Court of Claims. Upon the respondent's motion for summary judg-

ment, on the contention that the claim was maritime in nature and therefore not within the jurisdiction of the Court of Claims, that Court, in its opinion, stated:

> ". . . if it (petitioner) is able to establish a binding agreement for the settlement of its claim, finally approved by the Commission, this court would have jurisdiction of an action brought on that agreement."

On March 6, 1957 the Court of Claims dismissed plaintiff's action on the grounds that the foregoing facts did not constitute a binding settlement agreement on the part of the parties. From that dismissal this petition is submitted.

Argument

The action of the Maritime Commission on December 8, 1947 resulted in the substitution of civil contract for a maritime contract.

Prior to the action of the Maritime Commission on December 8, 1947, the petitioner had an enforceable claim in admiralty against the respondent under the Suits in Admiralty Act based upon respondent's failure to fulfill its obligations under the charterparty—a maritime contract. But the action of the Maritime Commission in approving the settlement resulted in the creation of a new civil (as distinct from admiralty) contract. That this is so is supported by the opinion in *Fox* v. *Patton*, 22 Fed. 746, wherein the court said at pp. 746, 747:

> "The only foundation of this action, therefore, is the new and independent promise, on their part, alleged in the libel, to pay the libellants for the previous debt of the ship and of her owners. It does not appear whether or not the debt of the ship and of her owners was discharged, or intended to be discharged, by this new and independent promise of the respondents. If it was not discharged, the libellants'

> remedy against them remains still available. If the former debt was discharged, then it is a case of novation, in which the only relation of the prior debt to the new obligation is that the former furnishes the consideration of the latter. This original consideration, though it is itself a maritime consideration, is not sufficient to make such a new and independent contract a maritime contract."

Approval Subject to Clearance is sufficient approval to bind the Maritime Commission.

A similar situation to the present one occurred in *Adams, et al. v. U. S.*, 101 F. Supp. 956; aff'd 201 F. 2d 150. The government raised exactly the same defense in the *Adams* case as in this; that clearance by the Legal Division was a prerequisite to the existence of an agreement binding the United States. The Director of the Division of Redelivery of Chartered Vessels was authorized by the War Shipping Administration, pursuant to Administrative Order 13, Sup. 18 (revised), Amendment 1, to conclude settlements "subject to clearance by the Legal Division." The Court in the *Adams* case found as follows, 101 F. Supp. at p. 961:

> "It must be held that the words 'subject to clearance by the Legal Division' imposed no requirement of approval of that division to make a settlement by the director binding upon the United States but are only a directive to him to seek the assistance of the Division in the drafting and execution of formal agreements."

In this case, as in the *Adams* case, any other interpretation of "clearance" by General Counsel or the Legal Division would be quite unreasonable. The clearance referred to was obviously for the purpose of releases, vouchers and the like. Inasmuch as the General Counsel had already reviewed this memorandum on at least three separate occasions, it would appear unreasonable for the Maritime Com-

mission to require yet another review of the settlement by the General Counsel.

Plaintiff knew that the compromise had been approved by the Commission and, furthermore, that it previously had received the approval of the General Counsel's office. The instant that agreement was approved by the Commission the settlement was effective. See *Braun* v. *U. S.* (Ct. of Claims (1942)) 46 F. Supp. 993, 1005 which states:

> "The 'implied agreement' contemplated * * * is not an agreement 'implied in law,' * * * but an agreement 'implied in fact' founded upon a meeting of minds, which although not embodied in an express contract, is inferred as a fact from conduct of the parties showing in the light of the surrounding circumstances, their tacit understanding."

More than two years after the claim had been filed, the Commission sought to rescind an agreement which had been approved by all concerned. At any time prior to the meeting of December 8, 1947, any member of the Commission or its staff could have raised any and all objections to the agreement as embodied in the memorandum dated September 15, 1947, which in turn was a word-for-word copy of the agreement concluded in December 1946. At no time was such objection made. After the meeting on December 8, the Commission could no longer rescind that agreement.

The law is quite clear that the acceptance of any agreement may be by such ratification alone as well as by formal written notice. *The Atlanta*, 82 F. Supp. 218, 234. Similarly, the agreement as embodied in the memorandum was sufficient writing for formal application without the necessary releases, vouchers and other documents necessary for the final passing of the money. *Adams* v. *U. S.*, supra; *Morgan* v. *Patillo*, C. A. 5 1924, 297 F. 140.

There is no doubt that the acceptance by plaintiff and the Maritime Commission, on December 8, 1947 of the

terms of the agreement for settlement established a binding agreement, under which the petitioner is entitled to the relief herein sought.

Conclusion

Plaintiff is entitled to recover $19,270.00 representing settlement on 50% basis of plaintiff's claim for bauxite damage to the S. S. MOLDOVA by virtue of the action of the Maritime Commission action of December 8, 1947, and petitioner prays that certiorari be granted.

Respectfully submitted,

WILBUR E. DOW, JR.

Of Counsel:

DANIEL L. STONEBRIDGE

Wilbur E. Dow

Appendix I

In the United States Court of Claims

No. 49813

(Decided October 5, 1954)

COMPANIA ITHACA DE VAPORES, S. A. v. THE UNITED STATES

Mr. Daniel L. Stonebridge for plaintiff. *Messrs. William A. Wilson* and *Doir & Symmers* were on the briefs.

Mr. Leavenworth Colby, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for defendant. *Mr. Hubert H. Margolies* was on the brief.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before the court on defendant's motion for summary judgment.

Plaintiff chartered its ship, the *SS. Moldova*, to the defendant on the 3d of April 1942, under a time charter. It is alleged that when the defendant redelivered the ship to plaintiff it was not "in like good order and condition" as it had been when plaintiff delivered it to the defendant, and that the cost of putting it in such condition was $60,400.91. For this sum it sues.

Subsequently, plaintiff filed an amended petition, by which it added a paragraph, reading as follows:

> Plaintiff made due and timely demand of the United States Maritime Commission for payment of the claim as above set forth. The United States Maritime Commission through its duly authorized agents gave admin-

istrative approval to compromise of the claim as presented. Thereafter, and after expiration of the preiod of time within which plaintiff might have commenced suit against the United States, the United States Maritime Commission withdrew its administrative approval for compromise of the claim, and thereafter failed and refused to make payment of all or any part of the said claim, and continues to so fail and refuse.

The claim asserted in the original petition is without the jurisdiction of this court, under our decision in *Polar Compania De Navegacion, Ltda., as owner of the steamship Penelopi, v. The United States*, C. Cls. No. 54-52, this day decided.

In the quoted paragraph of the amended petition plaintiff evidently intends to ground its action on an account stated, or, more properly, a compromise agreement. In its brief it says:

> The present action is brought, not upon the damage cause of action under the charter party referred to, but upon the settlement agreement reached between plaintiff's attorneys and defendant acting through the War Shipping Administration and the Maritime Commission.

It says that this court has jurisdiction grounded upon such an agreement.

To its final memorandum in the case it sets forth the affidavit of Anthony N. Zock, who was an associate of the firm of Dow & Symmers, plaintiff's attorneys. Mr. Zock states that he entered into an agreement with Mr. Arthur Ferris, an attorney in the legal division of the War Shipping Administration, to settle plaintiff's claim for "50 percent of the cost of repairing the damage." He says the matter was then referred to a Captain Scott, of the War Shipping Administration, to compute the cost of repairs, and thereafter Commander Reynolds, an assistant of Captain Scott, "prepared a memorandum accepting the agreement for the signature of Mr. Gerard Helmbold * * * to be submitted to the Commission for a formal meeting for their approval."

He further says that Mr. Helmbold signed the agreement in late 1946 or early 1947, and that the matter came before the Maritime Commission in September 1947, and upon information and belief, he says, "the Commission approved unanimously the settlement agreement * * *." Then the Maritime Commission, he says, referred the matter to its General Counsel "for finalization." The General Counsel's office recommended the disapproval of the agreement, and shortly thereafter the Maritime Commission rescinded it. This, he says, was immediately after the expiration of the statute of limitations on an action on the charter party under the Suits in Admiralty Act, *supra*.

There are defects in plaintiff's pleading, but if it is able to establish a binding agreement for the settlement of its claim, finally approved by the Commission, this court would have jurisdiction of an action brought on that agreement. Since there is a dispute about the facts connected with the alleged agreement, it is obvious that defendant's motion for summary judgment must be overruled.

Plaintiff is given leave to amend the above-quoted paragraph of its petition. The cause will proceed upon the cause of action stated. Defendant is allowed 10 days to answer plaintiff's call on the Maritime Commission.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

Appendix 2

In the United States Court of Claims

No. 49813

(Decided March 6, 1957)

COMPANIA ITHACA de VAPORES, S. A.
v. THE UNITED STATES

Mr. William A. Wilson for plaintiff. *Mr. Robert J. Nicol* was on the brief.

Mr. Charles S. Haight, Jr., with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant. *Mr. Leavenworth Colby* was on the brief.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff's amended petition is based upon an alleged settlement with the Maritime Commission of its claim for damage to its vessel while it was under time charter to the defendant. The question now presented to us is whether or not defendant's obligation to respond in damages, which is of course maritime in nature, has been supplanted by a contract to pay a certain sum, which gives this court jurisdiction.

Before redelivery of plaintiff's vessel, the *SS. Moldova*, it was surveyed, and redelivery specifications embodying 272 items were prepared and agreed upon by representatives of the plaintiff and the War Shipping Administration, with the exception of plaintiff's claim for damage to its vessel as the result of the carriage of bauxite. All of plaintiff's

claims have been paid except this one. For this one it now sues for $60,106.91. While plaintiff's petition has not been so amended, we suppose we should treat it as having been amended to sue for $19,270, the amount of the settlement agreed to by it, and which it alleges the Maritime Commission agreed to.

The parties negotiated for the settlement of plaintiff's claim for bauxite damage, and finally reached an agreement with the Chief, Bureau of Operations. Accordingly, this official presented to the Maritime Commission a memorandum dated September 15, 1947, stating that the parties had reached an agreement as to the items clearly chargeable to the bauxite damage, and recommending the payment of 50 percent of the total amount of the items agreed upon, in full settlement of plaintiff's claim. This 50 percent amounted to $19,270. The Assistant General Counsel endorsed the memorandum "no legal objection."

After discussion of the memorandum, it was referred by the Commission to the General Counsel for review and report. He suggested that the memorandum be rewritten to show that the date of defendant's obligation for this damage arose on the date of the contract, rather than on the date of the delivery. As rewritten, it was again presented to the Maritime Commission.

The minutes of the Commission, dated December 8, 1947, recited:

> After discussion, by the unanimous "yea" vote of the members of the commission present, the recommendations contained in the foregoing memorandum were approved *subject to clearance by the General Counsel, and the proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect.* [Italics ours.]

On the following day, December 9, 1947, the Secretary of the Commission addressed a memorandum to the General Counsel reading as follows:

At a meeting on December 8, 1947, the Commission approved the attached memorandum dated September 15, 1947, from the Chief, Bureau of Operations, subject to clearance by you.

Kindly furnish me with your clearance as soon as possible.

Plaintiff's counsel was advised of the action taken by the Commission by someone in the office of the Secretary of the Commission, on the occasion of his visit to the Secretary's office on December 8, 1947, to ascertain the action taken.

The plaintiff claims that this action of the Commission was an approval by it of the agreement entered into between plaintiff and the Chief, Bureau of Operations, and constituted a novation, the substitution of a contract to pay a definite amount for and in lieu of its original claim for damages, upon which contract plaintiff has the right to sue in this court.

We do not think this position can be sustained.

The Commission's approval of the settlement was not unequivocal. It was approved, "subject to clearance by the General Counsel,"—whatever that may mean. Before the General Counsel had cleared it, Commissioner Raymond S. McKeough, who was not present when the Commission met on December 8, 1947, addressed a memorandum to the General Counsel advising him that he was asking the Commission to reconsider its action. At the next meeting of the Commission the matter was again discussed, but was "laid over" without action. The memorandum was later presented to the Commission at its meetings on January 9, January 13, January 20, February 4, February 24, and March 2, 1948, and at each meeting was "laid over." Finally, on March 5, it was again presented to the Commission, accompanied by a memorandum from the General Counsel recommending that plaintiff's claim be disallowed. This recommendation was approved by the Commission, and the proposed settlement was disapproved.

We are not sure just what the Commission meant by its approval of the agreement by the plaintiff and the Chief of

the Bureau of Operations, "subject to clearance by the General Counsel"; but, whatever the Commission may have meant by this, it is clear that no final action had been taken approving the settlement and, therefore, the Commission has never promised to pay the amount agreed upon. Since there was no promise to pay, plaintiff's only right of action is on its original claim; there was no promise upon which it can sue.

If we assume, as plaintiff contends, that the phrase, "subject to clearance by the General Counsel," means only, subject to his putting the agreement into fornial legal terminology, still, there was no promise to pay until this had been done. Even if the phrase meant what plaintiff contends, no promise to pay would have arisen until after counsel had prepared the necessary documents setting forth the agreement and a promise to pay, in consideration of the release by plaintiff of its claim against the defendant, or whatever else counsel may have thought necessary and proper to include in the documents. As we have seen, this was never done.

The most that plaintiff can make out of the action of the Commission on December 8, 1947, was an agreement on the amount of the liability and of the amount payable in satisfaction thereof; but the terms and conditions on which payment would be made had not been specified. Therefore, plaintiff had no new promise upon which it can sue, and can avail itself of the purported agreement only in an action upon its original claim for damage to its vessel while it was under charter to plaintiff.

This court has no jurisdiction of such an action, exclusive jurisdiction having been vested in the district courts under the Suits in Admiralty Act (41 Stat. 525; 46 U. S. C. sec. 742).

The foregoing is supported by the principle of *M. & J. Tracy, Inc.* v. *United States*, 125 C. Cls. 70, cert. den. 346 U. S. 854; *Sinclair Refining Co.* v. *United States*, 129 C. Cls. 474; *Isthmian S. S. Co.* v. *United States*, 131 C. Cls. 472; *Fox* v. *Patton*, 22 Fed. 746; and the case upon which plaintiff relies, *Adams* v. *United States*, 101 F. Supp. 956, affirmed

(2d Circuit, 1953) 201 F. 2d 150. See also *United States* v. *Massey*, 5 F. 2d 1013.

It results that plaintiff's petition must be dismissed.

It is so ordered.

LARAMORE, *Judge*; and JONES, *Chief Judge*, concur.

MADDEN, *Judge*, dissenting.

I see nothing in this case except a refusal by the Maritime Commission to do what it had contracted to do, because it changed its mind after it had made the contract. Private persons and private enterprises do not have the privilege of changing their legal obligations, by changing their minds. It is apparent that clearing by the General Counsel was nothing but a formal procedural step, and there is no indication whatever that the General Counsel found anything wrong with the contract. The member of the Commission who was absent when the Commission accepted the plaintiff's offer finally convinced the Commission that it should repudiate its contract, and the General Counsel had nothing to do with that action. I think what the Commission did was a plain breach of contract for which there was no moral nor legal justification. The court is aware, of course, that the relegation of the plaintiff's claim to its status as a maritime contract is a complete denial of relief to the plaintiff, since the Statute of Limitations has run on the maritime contract claim.

LITTLETON, *Judge*, joins in the foregoing dissenting opinion.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner Marion T. Bennett, and the briefs and argument of counsel, makes the following findings of fact:

1. The *SS. Moldova*, owned by plaintiff, Compania Ithaca de Vapores, S. A., a Panamanian corporation, was chartered under WARSHIPTIME (Forslag) charter to defendant, through

the War Shipping Administration, on April 3, 1942, at a monthly rate of hire of $30,450. The vessel was employed by the defendant in the bauxite trade.

2. Prior to redelivery to plaintiff on February 28, 1946, the *SS. Moldova* was surveyed and redelivery specifications embodying 272 items were prepared and agreed upon by representatives of the plaintiff and the War Shipping Administration. These items covered claims for damage as a result of the carriage of bauxite, collision and heavy-weather damage, removal of certain defense installations and restoration. All of these claims have been settled between the parties except those relating to bauxite damage for which plaintiff claims $60,400.91 in this suit.

3. In its amended petition, filed July 1, 1954, plaintiff alleges that its representatives entered into a compromise agreement with defendant for settlement of the bauxite claims but that after expiration of the time within which plaintiff might have commenced suit against the United States the Maritime Commission withdrew its administrative approval of the compromise and refused to pay plaintiff thereunder. In its opinion of October 5, 1954 (129 C. Cls. 745), on defendant's motion for summary judgment, this court authorized amendment of the plaintiff's petition and stated that if plaintiff is able to establish a binding agreement for the settlement of its claim, finally approved by the Commission, the court would have jurisdiction of an action brought on that agreement. The court directed that the "cause will proceed upon the cause of action stated." There has been no further amendment of the petition.

4. After disallowance of the bauxite damage claim plaintiff's attorneys conferred on numerous occasions with representatives of the War Shipping Administration and Maritime Commission, and submitted a brief in support of plaintiff's position. The charter, agency and traffic counsel of the Maritime Commission indicated defendant would make a

settlement on a basis of 40 percent of the claim but this was rejected by plaintiff's attorneys.

5. On December 19, 1946, the charter, agency and traffic counsel of the Commission in an office memorandum to the head of the Division of Redelivery of Chartered Vessels, stated that it was his opinion that plaintiff's position had substantial merit although he believed defendant's position would prevail in the event of litigation. The memorandum indicated a further belief that a settlement on the basis of 50 percent of the cost of repairs would be in the Government's interest. This sum would be $19,270. The counsel indicated such a settlement would be without legal objection.

6. On August 5, 1947, the chief of the Bureau of Operations, Maritime Commission, presented to the Commission a memorandum dated June 27, 1947, entitled "SS CONSTANTINOS H. MOLDOVA and EUREKA—Authorization to Settle Outstanding Claims for Repairs, Removals and Restoration on Redelivery from Time Charter." The memorandum was sent back with the direction that it be resubmitted in accordance with the then current appropriation act.

7. At the meeting of the Maritime Commission on October 27, 1947, the chief of the Bureau of Operations presented to the Commission a memorandum dated September 15, 1947, which had the same title as the one referred to in the finding above. This memorandum reviewed the nature of the use of the *Moldova*, the claims of damages, and reported that the chief of the Redelivery of Chartered Vessels Branch had conferred with the owner's representatives on the claims submitted and had reached agreement as to which items were clearly chargeable to the excessive usage due to bauxite and that the owner's agents had agreed to accept such figures. The memorandum recommended that the Commission find that certain charter redelivery obligations were then outstanding and unpaid and that the settlement on the basis

of payment by the defendant of 50 percent of the amount of the agreed claim would be reasonable and proper. It was further recommended that the Commission authorize the chief of the Redelivery of Chartered Vessels Branch, Operating Contracts Division, to enter into agreements with the plaintiff by which the defendant would be released from all claims on the *SS. Moldova* in consideration of payment by the defendant of the amount of $40,436.07, of which amount $19,270 constituted the 50 percent proposed settlement of the bauxite damage claim. The memorandum bore at the bottom thereof the following endorsement:

No Legal Objection.

(Signed) FRANCIS B. GOERTNER,
Assistant General Counsel.

By: METZ

After discussion the memo was referred to the general counsel for review and report to the Commission.

8. The general counsel on November 4, 1947, referring to the memorandum of September 15, 1947, suggested that the chief of the Bureau of Operations rewrite it in accordance with the general counsel's determination that the date of the contract rather than the date of redelivery should govern in determining the date the obligation arose. This had been done on another vessel and the suggestion would have made the practice uniform. The general counsel suggested that the rewritten memorandum be submitted to the Commission.

9. The minutes of the Maritime Commission of December 8, 1947, contain the following statement:

> Pursuant to action of the Commission at the special meeting on October 27, 1947 (1st Session), there was presented the following memorandum dated September 15, 1947, from the Chief, Bureau of Operations, as revised in accordance with memorandum from the Gen-

eral Counsel to the Chief, Bureau of Operations, dated November 4, 1947, which is in the files of the Commission:

Following the statement quoted above the minutes set forth the memorandum of September 15, 1947, as described in finding 7. Thereafter the minutes contain the following statement:

> After discussion, by the unanimous "yea" vote of the members of the Commission present, the recommendations contained in the foregoing memorandum were approved subject to clearance by the General Counsel, and the proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect.

The Secretary of the Commission, on December 9, 1947, gave a memorandum to the general counsel, stating:

> At a meeting on December 8, 1947, the Commission approved the attached memorandum dated September 15, 1947, from the Chief, Bureau of Operations, subject to clearance by you.
>
> Kindly furnish me with your clearance as soon as possible.

10. Plaintiff's counsel was advised by an unidentified person in the office of the Secretary of the Commission of the action taken by the Commission on December 8, 1947, when he visited the office on that date to inquire.

11. Commissioner Raymond S. McKeough was not present at the time of the action of the Commission on December 8, 1947. On December 18 he addressed a memorandum to the general counsel advising that he was asking the Commission to reconsider its action upon his return. He addressed such a request to the Secretary of the Commission. The memorandum of September 15, 1947, which had been approved on December 8, 1947, subject to clearance by the general counsel was, accordingly, brought up at the meeting of the Commission on January 6, 1948. After discussion the matter was "laid over" without action.

12. The memorandum from the chief of the Bureau of Operations, dated September 15, 1947, was presented to the Maritime Commission at meetings during 1948 on January 9, January 13, January 20, February 4, February 24 and March 2, and on each occassion the matter was "laid over."

13. At the Maritime Commission meeting of March 5, 1948, there was again presented to the Commission the memorandum dated September 15, 1947, which was the subject of Commission action on December 8, 1947. At this meeting the Commission also had before it a memorandum dated March 4, 1948, from the general counsel who recommended that the claims under consideration be disallowed. After discussion, the memorandum of September 15, 1947, was disapproved and the recommendations of the general counsel were approved.

14. Through its attorneys, plaintiff transmitted to the chief of the Division of Claims, Maritime Commission, on November 29, 1948, a public voucher claiming the amount of $19,270, equal to one-half of the cost of repairing the bauxite damage to the *SS. Moldóva*. By letter dated August 22, 1949, the defendant, through the Secretary of the Maritime Commission, advised that the Commission had directed that denial of plaintiff's claim for bauxite damage to the *SS. Moldóva* would not be reconsidered and returned the voucher.

15. The evidence establishes and it is found that plaintiff knew that any compromise of its bauxite damage claim had to receive the approval of the Maritime Commission and its general counsel, that such approval was never given and that no subordinate officials of the Commission had any authority to bind the Commission.

16. The opinion of the Court of Claims in this case on October 5, 1954, held that the claim asserted in the original petition, filed September 12, 1950, is without jurisdiction

of this court under the authority of *Polar Compania de Navegacion, LTD., v. as owner of the Steamship Penelopi v. The United States* (129 C. Cls. 471). On August 3, 1951, plaintiff filed a suit in the United States District Court in the Southern District of New York, Adm. 169-241, praying for judgment in the same amount as in its original petition in the Court of Claims and making the same allegations. The case was dismissed for failure to comply with the two-year statute of limitations of the Suits in Admiralty Act.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law plaintiff is not entitled to recover, and its petition is therefore dismissed.

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No. ~~1052~~ 459

In the Supreme Court of the United States

OCTOBER TERM, 1956

COMPANIA ITHACA DE VAPORES, S. A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1052

COMPANIA ITHACA DE VAPORES, S. A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims dismissing the petition in that court (Pet. 13-23) is reported at 149 F. Supp. 257. The opinion of the Court of Claims denying the motion of the United States for summary judgment (Pet. 9-11) is reported at 124 F. Supp. 627.

JURISDICTION

The decision of the Court of Claims dismissing the petition in that court was entered on March 6, 1957 (Pet. 13). The petition for a writ of certiorari was filed June 3, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether a vote by the Maritime Commission, approving a proposed settlement of petitioner's claim for damage to its ships "subject to clearance by the General Counsel," constituted an acceptance of the proposal upon which petitioner could maintain suit in the Court of Claims, although the action of the Commission was never officially communicated to petitioner and although the proposed agreement was not cleared by the General Counsel and rejected upon reconsideration by the Commission.

STATEMENT

Petitioner, a Panamanian corporation, had time-chartered its vessel (the SS. *Moldova*) to the United States, through the War Shipping Administration, under a WARSHIPTIME (Forflag) Charter commencing in April, 1942 (Pet. 17-18). Prior to redelivery to plaintiff on February 28, 1946, the *Moldova* was surveyed and, while a number of items of damages to the vessel resulting from the charter were agreed upon and settled between the parties, no agreement could be reached with respect to petitioner's claim of $60,400.91 for damage resulting from the carriage of bauxite (Pet. 18). Petitioner, on September 12, 1950, brought suit for this amount in the Court of Claims, basing its claim upon the Government's alleged failure to redeliver the ship in "good order and condition" as required by the terms of the charter (Pet. 9). On July 1, 1954, petitioner amended its petition to allege that the Maritime Commission had approved a compromise of this claim in the amount of $19,270, but that, after expiration of the time within which petitioner could

have commenced suit under the Suits in Admiralty Act (46 U.S.C. 741-752) against the United States on the original claim, the Commission withdrew its administrative approval of the settlement (Pet. 9-10).[1] The Government moved for summary judgment, urging that the claim was exclusively cognizable in admiralty. This motion was denied on October 5, 1954 (Pet. 9-14). The court below recognized that the claim asserted in the original petition was a maritime cause of action of which the district courts have exclusive jurisdiction, citing *Polar Compania de Navegacion v. United States*, 124 F. Supp. 625 (C. Cls.). Nevertheless, it held that it would sustain its own jurisdiction if petitioner were able to establish a binding agreement for the settlement of the maritime claim (Pet. 11).

Hearings were held before a Commissioner, and the case then argued before the court which on March 6, 1957, held that petitioner had failed to establish a binding settlement agreement and, accordingly, dismissed the petition. As established by the court's findings (Pet. 17-23), it appears that after prolonged negotiations for the settlement of petitioner's claim, the Chief, Bureau of Operations, presented to the Maritime Commission a memorandum dated September 15, 1947, stating that the parties had agreed to a settlement of 50% of the actual bauxite damage, or $19,270, and recommending that the Commission authorize the chief of the appropriate office to enter into settlement

[1] On August 3, 1951, petitioner had filed suit in the United States District Court for the Southern District of New York, praying for judgment in the same amount as in its original petition in the Court of Claims and making the same allegations. That suit was dismissed for failure to comply with the two-year statute of limitations of the Suits in Admiralty Act (Pet. 23).

agreements with petitioner. The Commission discussed the memorandum and then referred it to the General Counsel for review and report (Pet. 20). At his suggestion, the memorandum was revised and, on December 8, 1947, was again submitted to the Commission (Pet. 20). The minutes of the Commission for that date set out this memorandum and then contain the following recitation, upon which petitioner relies as the basis of his claim (Pet. 21):

> After discussion, by the unanimous "yea" vote of the members of the Commission present, the recommendations contained in the foregoing memorandum were approved *subject to clearance by the General Counsel*, and the proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect. [Emphasis added.]

No official notification of this action was ever given to petitioner. The Court of Claims found (Pet. 21) that petitioner's counsel "was advised by an unidentified person in the office of the Secretary of the Commission of the action taken by the Commission on December 8, 1947, when he visited the office on that date to inquire."[2]

The day following the Commission's meeting, the Secretary of the Commission forwarded the memoran-

[2] Petitioner's then attorney testified at the hearing before the Commissioner that he received this information from one of the "four girls sitting outside the office * * *" of the Secretary of the Commission; that at the attorney's request, this girl examined the Commission's docket book, asked the attorney the name of the vessel, and told him that his offer had been approved (T. 81-82).

dum to the General Counsel, advising him that the Commission had approved it, "subject to clearance by you," and requesting him to furnish his clearance as soon as possible (Pet. 21). The memorandum, however, was never cleared by the General Counsel; instead, at the request of Commissioner Raymond S. McKeough, who was not present at the Commission's meeting of December 8, 1947, the memorandum was resubmitted to the Commission and, after being discussed and "laid over" without action during several Commission meetings (Pet. 21), it was again presented to the Commission on March 5, 1948, accompanied by a memorandum from the General Counsel recommending that petitioner's claim be disallowed (Pet. 22). After discussion, this recommendation was accepted, and the proposed settlement disapproved (Pet. 22).

Upon petitioner's subsequent attempt to obtain payment of its claim, its voucher was returned, together with a letter from the Secretary of the Commission advising petitioner that the Commission had directed that denial of its claim would not be reconsidered (Pet. 22).

On these facts, the court held, contrary to petitioner's contention, that the Commission had at no time taken final action approving the settlement, and had never promised to pay the proposed amount (Pet. 15-16). The court held that the Commission's approval was qualified by the phrase "subject to clearance by the General Counsel," and that even if, as petitioner claimed, this phrase meant only, subject to his putting the agreement into formal legal terminology, that still there was no promise to pay until this had been done, and until the General Counsel "had prepared the necessary documents setting forth the agreement and a

promise to pay, in consideration of the release by plaintiff of its claim against the defendant, or whatever else counsel may have thought necessary and proper to include in the documents. As we have seen, this was never done." (Pet. 16). Accordingly, the court held that petitioner had no new promise on which it could sue, and that since any right of action on the original charter agreement was beyond the court's jurisdiction, the petition must be dismissed (Pet. 16-17).

ARGUMENT

This case presents no issue appropriate for this Court's consideration. No conflict of decisions is involved and no important issue of law. The decision of the Court of Claims dismissing the petition rests upon the application of settled principles of contract law to the particular facts of this case; it is correct, and requires no further review.

There is no substance to petitioner's contention that the Commission's action embodied in its minutes of December 8, 1947, constituted an acceptance of the offer of settlement of petitioner's claim. As the court below held, the Commission's determination was at most a qualified acceptance, since it was expressly made "subject to clearance by the General Counsel." It is well established that an acceptance of an offer "subject to" the approval of the offeree's attorney is not effective or operative unless and until such approval is obtained. 1 Corbin, *Contracts* (1950) § 61, p. 186; see, *e.g.*, *Lilly* v. *Haynes Co-operative Coal Mining Co.*, 50 N.D. 465, 196 N.W. 556, 559, and cases there cited.[3] In the present

[3] Petitioner attempts to controvert this settled rule of contract law by reference to the opinion of the district court in *Adams* v. *United States*, 101 F. Supp. 956 (D. Mass.), affirmed, 201 F. 2d 150

case, of course, the required approval never was obtained. On the contrary, the General Counsel subsequently disapproved petitioner's claim and his memorandum to this effect was the basis of the Commission's ultimate rejection of the proposed settlement (Finding of Fact 13, Pet. 22).[4]

Moreover, even if the Commission's vote to accept petitioner's offer had not been qualified, this determination obviously was effective only as an intra-agency authorization; it was never officially communicated to petitioner and could not have been operative as an acceptance. Such a vote by an official board or a corporation's board of directors has uniformly been held to be solely an internal determination with no operative

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(C.A. 1), holding "that the words 'subject to clearance by the Legal Division' [incorporated in a regulation authorizing the Director of the Division of Redelivery of Chartered Vessels to conclude settlements of shipowners' claims upon redelivery of vessels] impose no requirement of approval of that Division to make a settlement by the director binding upon the United States, but are only a directive to him to seek the assistance of the Division in the drafting and execution of formal agreements." 101 F. Supp. at 961. That language, of course, is plainly inapposite here; it deals only with the question of whether the Director had the *authority* to make settlements without the approval of the Legal Division. There is no question in the present case of the authority of the Commission to settle petitioner's claim; the only issue is whether in fact it unconditionally exercised that authority, or, as the court below held, it expressly conditioned its approval of petitioner's claim on clearance by the General Counsel.

[4] Even if, as petitioner contends, the requirement of legal clearance meant only that the agreement was subject to being put into formal legal terminology, no contract would arise until after this was done, and the terms and conditions of payment, including provision for a valid release, were determined upon, and incorporated into legal documents. For where the offeree makes clear that its acceptance is conditioned upon the execution of a written agreement, it is well settled that the formal document thus contemplated is the only binding expression of the agreement. 1 Corbin, *Contracts*, § 30, p. 80; *id.* at § 61, p. 186.

effect as an offer or an acceptance until it is officially communicated to the other party to the contemplated agreement. The vote does not become legally effective simply because the latter "learns of it in some fortuitous manner." 1 Corbin, *Contracts*, § 11, p. 23; *id.* at § 67, p. 211. See, *e.g.*, *Mayor of Jersey City* v. *Town of Harrison*, 72 N.J.L. 185, 62 A. 765; *Al's Lunch, Inc.* v. *City of Revere*, 324 Mass. 472, 87 N.E. 2d 5.[5] Petitioner, of course, was never formally advised that its offer of settlement had been accepted, nor was it even officially informed that the Commission had conditionally approved the offer.

Thus, it is plain that no new and enforceable promise to pay was created by the Commission's vote of December 8, 1957. As the Court of Claims concluded (Pet. 16), the most that petitioner can make of the Commission's action is a recognition of the amount of the Government's liability under the original maritime charter; and the court properly held that it was without jurisdiction over any claim based on that agreement. Accordingly, the petition was properly dismissed.[6]

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[5] The court in *Al's Lunch* quotes extensively and with approval from an earlier Massachusetts opinion, *Dunham* v. *Boston*, 12 Allen 375, in which the plaintiff sought specific performance of an alleged contract by the City of Boston to convey realty, claiming that his offer had been approved by the city council and the mayor, but that the city officials had failed to execute the deed. In holding that the council's vote, even when approved by the mayor, did not establish a contract with the plaintiff, the court pointed out that the vote "was not communicated to the plaintiff as a contract, and it does not appear that it was intended to be so. On the contrary, it was to be communicated to the proper officers of the city as an authority to them to execute a deed, and it contemplates the deed as the only contract which the city was to make with the plaintiff. It was thus a mere preliminary to the completion of the contract." 87 N.E. 2d at 6.

[6] As noted in the statement of the case, *supra*, p. 3, the Court of Claims recognized that it had no jurisdiction over peti-

CONCLUSION

For the foregoing reasons, it is respectfully recommended that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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Assistant Attorney General.
SAMUEL D. SLADE,
ROBERT S. GREEN,
Attorneys.

JULY, 1957.

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tioner's original claim for damages arising out of an alleged breach of the terms of the maritime charter, but nevertheless held in its opinion of October 5, 1954, denying the Government's motion for summary judgment, that it could consider a claim based upon the breach of an alleged agreement to settle this liability. The court's final decision to dismiss the petition, of course, renders it unnecessary to determine the validity of this jurisdictional holding; nevertheless we point out that the alleged settlement agreement, arising out of the provisions of the charter party, flowed directly from the maritime obligation, and, we submit, retained its maritime characteristics. Accordingly, contrary to the court's decision, it is our position that, even if petitioner had been able to establish a binding settlement agreement with the Maritime Commission, any claim under such an agreement would be within the exclusive jurisdiction of the district courts under Section 2 of the Suits in Admiralty Act, 46 U.S.C. § 742. *Matson Navigation Co.* v. *United States*, 284 U.S. 352; *United States* v. *Adams*, 201 F. 2d 150, 151 (C.A. 1).

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